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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 451

SOLOMON P. ROSENBLOOM, Also Known as
SOL ROSENBLOOM,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals
for the Eighth Circuit.**

SOLOMON P. ROSENBLOOM,
Also Known as SOL ROSENBLOOM.

ISRAEL TREIMAN,
Of Counsel.
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St. Louis 2, Missouri.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner Solomon P. Rosenbloom, also known as Sol Rosenbloom, prays that a writ of certiorari issue to review an order and judgment of the United States Court of Appeals for the Eighth Circuit sustaining a motion by respondent to dismiss petitioner's appeal from a judgment and sentence of imprisonment for income tax evasion on the ground that his notice of appeal had not been timely filed.

JURISDICTION.

Petitioner was convicted of income tax evasion in the United States District Court for the Eastern District of Missouri. On July 24, 1957, the Court of Appeals, on motion by respondent to dismiss petitioner's appeal from the judgment and sentence of the District Court on the ground that the notice of appeal had not been timely filed, entered its judgment dismissing the appeal. A motion by petitioner to set aside this judgment was filed within the time prescribed by the rules of that Court and was denied on August 19, 1957. Jurisdiction of this Court to review the judgment of the Court below by writ of certiorari is invoked under 28 U. S. C. A., Sec. 1254 (1).

QUESTION PRESENTED.

Following his conviction by a jury, petitioner and his then attorney were in the court room on June 14, 1957, when the District Judge denied petitioner's written motion for new trial and imposed sentence. Through misapprehension of the Judge's remarks, the petitioner's attorney thought that the formal entry of the order denying the motion for new trial and of the judgment imposing sentence would be deferred until July 8, 1957. The Clerk of the District Court failed to mail either to the petitioner or to his attorney a notice of the entry of the order and judgment on June 14, 1957, as required by Rule 49 (c) of the Federal Rules of Criminal Procedure, 18 U. S. C. A. 539. As a result, petitioner's attorney did not file a notice of appeal until July 8, 1957.

Under the foregoing circumstances, was the running of the ten-day period for filing the notice of appeal suspended?

RULE INVOLVED.

Rule 49 (c) of the Federal Rules of Criminal Procedure, 18 U. S. C. A. 539, which is specifically involved in this case, reads as follows:

> "Immediately upon the entry of an order made on a written motion subsequent to arraignment the Clerk shall mail to each party affected thereby a notice thereof and shall make a note in the docket of the mailing."

STATEMENT.

Petitioner was convicted of income tax evasion by a jury in the United States District Court for the Eastern District of Missouri, on May 22, 1957, and on June 5, 1957, motion for new trial was filed. On June 14, 1957, the day set for sentencing, petitioner and his then attorney, Charles M. Shaw, who had represented petitioner at the trial, appeared before the trial judge, who announced that

it was his judgment that petitioner be committed for eighteen months and fined $2,500. Upon Mr. Shaw's request "for some time . . . within which to file an appeal", the judge said "Be given until July 8th". (See Proceedings in District Court on Imposition of Sentence, Tr. of Record, 24.)

Although the docket in the District Court shows entry of the Court's orders on June 24, 1957, overruling the motion for new trial as well as the judgment and imposition of sentence and fine, neither the petitioner nor his then attorney were aware of it. The attorney's "understanding" was that "neither the actual overruling of the motion nor the sentence and judgment would be in effect until July 8, 1957." (See Affidavit of Charles M. Shaw, Tr. of Record, 20.) The petitioner, having had no legal training, was, of course, wholly ignorant of the technical aspects of the proceedings on June 14, 1957. (See Affidavit of Petitioner, Tr. of Record, 21.)

Neither the petitioner nor his attorney received any notice in writing from the Clerk of the District Court as to the entry of the orders on June 14, 1957. This is sworn to in their affidavits (above referred to) and respondent has not denied that the Clerk failed to mail such notice.

As a result of his misunderstanding of the trial court's actions on June 14, 1957, petitioner's then attorney did not file a notice of appeal until July 8, 1957, at which time he also obtained approval of a supersedeas bond on appeal. (See Docket Entries in District Court, Tr. of Record, 4.)

On July 11, 1957 respondent filed a motion to dismiss the appeal on the ground that the notice of appeal was not filed in time. On July 24, 1957 the Court of Appeals sustained this motion and entered judgment dismissing the appeal. On July 29, 1957, and within the time allowed under the rules of the Court of Appeals for the Eighth Circuit, petitioner filed a motion to set aside the judgment dismissing the appeal.

It was at this point that petitioner's former attorney, Mr. Shaw, withdrew from the case, and petitioner retained present counsel to represent him. On August 19, 1957, the motion to set aside the judgment dismissing the appeal was denied, but on August 27, 1957, the Court of Appeals ordered a stay of the mandate pending a petition to the Supreme Court of the United States for a writ of certiorari (Tr. of Record, 28, 30).

Reasons for Granting the Writ.

The judgment of the Court below is in conflict with the decisions of the Court of Appeals of other circuits, and probably also with the decision of this Court in the recent case of **Diego Gonzales, Petitioner, v. United States**, 1 L. ed. 2d 363, decided January 21, 1957.

The most recent reported opinion by a United States Court of Appeals on the question here involved seems to be that of the Court of Appeals for the Sixth Circuit, in **Lohman v. United States**, 237 F. 2d 645, decided October 25, 1956. The following paragraph from that opinion is here quoted because it not only reflects the view of that Court, but also indicates the extent to which that Court's position is supported by other Courts of Appeals.

> "The general rule appears to be that where there has been a failure or delay in giving notice on the part of the clerk the time for taking an appeal runs from the date of later actual notice or receipt of the clerk's notice rather than from the date of the entry of the order. Oddo v. United States, 2 Cir., 171 F. 2d 854, certiorari denied 337 U. S. 943, 69 S. Ct. 1498, 93 L. Ed. 1747; United States v. Dunbar, 2 Cir., 212 F. 2d 654; Wallace v. United States, 8 Cir., 174 F. 2d 112, certiorari denied 337 U. S. 947, 69 S. Ct. 1505, 93 L. Ed. 1749; West v. United States, 94 U. S. App. D. C. 46, 222 F. 2d 774. See Remine v. United States, 6 Cir.,

161 F. 2d 1020, certiorari denied 331 U. S. 862, 67 S. Ct. 1759, 91 L. Ed. 1868. As said by the Supreme Court in Hill v. Hawes, 320 U. S. 520, 523, 64 S. Ct. 354, 336, 88 L. Ed. 283, in discussing a similar rule under Federal Rules of Civil Procedure, 28 U. S. C. A., —'It is true that Rule 77 (d) does not purport to attach any consequence to the failure of the clerk to give the prescribed notice; but we can think of no reason for requiring the notice if counsel in the cause are not entitled to rely upon the requirement that it be given. It may well be that the effect to be given to the rule is that, although the judgment is final for other purposes, it does not become final for the purpose of starting the running of the period for appeal until notice is sent in accordance with the rule.' **We are of the opinion that implied or constructive notice of the filing of an order is not sufficient to start the running of the period for appeal.**" (237 F. 2d 646.) [Emphasis ours.]

The last sentence of the foregoing quotation is especially important because respondent will undoubtedly make the argument here, as it did in its memorandum to the Court below, that petitioner and his attorney were present in the court room when the District Judge overruled the motion for new trial and imposed sentence. The point to observe, however, is that presence in a court room is not per se the equivalent of **actual knowledge.** The opinion makes it clear that it is only where such actual knowledge is established that the notice required by Rule 49 (c) may be deemed to have been waived so as to start the running of the period for appeal.

As has been pointed out in the Statement, both the petitioner and his then attorney have submitted affidavits that they understood the trial judge to say that he would defer entering his order denying the motion for new trial and his sentence until July 8, 1957, and that they therefore

had no **actual knowledge** that the entry was made on June 14, 1957. These sworn statements have not been challenged. The most that can perhaps be said is that the petitioner's attorney should have known what really transpired because he was present in the court room at the time. To this, we can only reply again, in the words of the Court in the **Lohman** case, supra, "implied or constructive notice . . . is not sufficient." Negligent the attorney may have been. But the fact remains that **he did not know** of the entry of the orders on June 14, 1957.

It is true that the opinion in the **Lohman** case distinguishes the situation there from those in **Huff v. United States**, 5 Cir., 192 F. 2d 911, and **Gonzales v. United States**, 1 Cir., 233 F. 2d 825, by saying that in those two cases "appellant was present in the court room." However, in neither of the two cases does it appear that the appellant claimed **misunderstanding amounting to lack of actual knowledge, despite his presence in the court room.** In the instant case such claim is not only made but is supported by sworn and uncontroverted affidavits.

Finally, attention is drawn to the fact that on January 21, 1957, this Court granted a petition for writ of certiorari in the **Gonzales** case, supra, in which the Court of Appeals for the First Circuit had held that the ten-day period for appeal was not suspended, despite the district clerk's failure to comply with Rule 49 (c), because the appellant was in the court room when the trial court entered its judgment. **Diego Gonzales, Petitioner, v. United States**, 1 L. ed. 363. Unfortunately, the memorandum decision of this Court does not specify the exact ground on which the petition was granted. Nevertheless, the granting of the petition and the remanding of the cause for consideration on the merits would seem to furnish some basis for supposing that this Court is not in accord with the views of the Court of Appeals in the Gonzales case on the question here involved.

CONCLUSION.

The dismissal of a cause without consideration of its merits merely because of some formal omission or oversight on the part of a litigant or his attorney may on occasion become a duty which a court of justice cannot avoid without doing violence to even more important interests of justice. It is submitted, however, that in this case the consequences of dismissal for the litigant far outweigh in severity any formal purpose which such dismissal might serve. For here the very freedom of the petitioner—freedom from imprisonment for eighteen months—now depends upon the determination of an issue which is wholly extraneous to the question as to whether he was or was not justly convicted. A ruling against him on the issue now before this Court will deprive him of **all** opportunity to prove that his conviction should be set aside for reasons of merit. So drastic a consequence, it is submitted, ought not to be visited upon the petitioner merely because of an innocent tardiness of fourteen days in filing a formal notice of appeal—especially since the tardiness was not even that of the petitioner, but of the lawyer on whom he depended to file the notice in proper time. For these reasons of simple justice and humanitarianism, and because of the case authorities cited above, petitioner prays that this Court will grant this petition and, as it did in the **Gonzales** case, will remand this cause for consideration of petitioner's appeal on the merits.

Respectfully submitted,

SOLOMON P. ROSENBLOOM,
Also Known as SOL ROSENBLOOM.

ISRAEL TREIMAN,
Of Counsel.

1955 Railway Exchange Building,
St. Louis 2, Missouri.

Affidavit.

(Pursuant to Rule 33.3 (c) of Revised Rules of Supreme Court of the United States)

City of St. Louis }
State of Missouri } ss

I, Israel Treiman, being of lawful age and having been duly sworn, upon my oath, do state that I have served a copy of this petition for certiorari upon Wayne H. Bigler, Jr., Assistant United States Attorney, who represented respondent in the Court below, by depositing the same in a United States mail box, with first class postage prepaid, addressed to him at the United States Courthouse, St. Louis, Missouri, on this the .... day of September, 1957, and that I have also served a copy of this petition upon the Solicitor General of the United States by depositing the same in a United States mail box, with air mail postage, prepaid, addressed to Solicitor General, Department of Justice, Washington, 25, D. C., on this ... day of September, 1957.

.....

Subscribed and sworn to before me, a notary public in and for the said city and state, this .... day of ...., 1957.

.....

My commission expires:

APPENDIX.

Judgment.

United States Court of Appeals
for the Eighth Circuit.

September Term, 1956.

No. 15,842.

Solomon P. Rosenbloom, also known as Sol Rosenbloom, Appellant,		Appeal from the United States District Court for the Eastern District of Missouri.
vs.		
United States of America.		

On motion of appellee to dismiss appeal taken by the filing of notice of appeal by defendant-appellant on July 8, 1957, from judgment and sentence entered by the United States District Court for the Eastern District of Missouri on June 14, 1957; after overruling of motion of defendant for new trial and for judgment of acquittal, and appellant having filed no opposition to said motion, and it appearing from the notice of appeal and statement of docket entries forwarded to this Court by the said District Court that the notice of appeal was not filed within the time provided in Rule 37 (a) (2) of the Federal Rules of Criminal Procedure, It is now here Ordered and Adjudged by this Court that the appeal from the said District Court, in this cause, be, and the same is hereby docketed, and dismissed.

It is further Ordered by this Court that the defendant in the said District Court, Solomon P. Rosenbloom, also known as Sol Rosenbloom, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

And it is further Ordered by this Court that the mandate in this cause issue to the said District Court at the expiration of five days from and after this date.

July 24, 1957.

(Order Denying Motion of Appellant to Set Aside Dismissal.)

United States Court of Appeals
for the Eighth Circuit.

September Term, 1956.

No. 15,842.

Monday, August 19, 1957.

Solomon P. Rosenbloom, also known as Sol Rosenbloom, Appellant, vs. United States of America.	Appeal from the United States District Court for the Eastern District of Missouri.

Judgment of this Court was entered July 24, 1957, dismissing the appeal from the judgment and sentence of the District Court of the United States for the Eastern District of Missouri entered June 14, 1957, for lack of jurisdiction.

The Court has now considered Motion of Appellant to set aside the dismissal; Response of Appellee, and Memorandum in Support of and in Opposition to the Motion, and after due consideration thereof, It is now here Ordered that the said motion is denied.

And it is further Ordered by this Court that the mandate in this cause issue to the said District Court on August 23, 1957.

August 19, 1957.